

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 RYAN KARNOSKI, et al,

11 Plaintiffs,

12 v.

13 DONALD J. TRUMP, et al.,

14 Defendants.

CASE NO. C17-1297 MJP

ORDER RE DOCUMENTS
SUBMITTED FOR *IN CAMERA*
REVIEW (DKT. NOS. 599, 624, 633,
639)

15
16 THIS MATTER comes before the Court upon the Government's submission of
17 documents for *in camera* review (Dkt. Nos. 599, 624, 633, 639), filed in response to the Court's
18 Orders on Defendants' assertion of the Deliberative Process Privilege (Dkt. Nos. 545, 566, 569,
19 617). After careful examination of each document submitted for *in camera* review, the Court has
20 sorted the documents into three categories:

21 (1) Documents that do not fall within the proper scope of the Deliberative Process

22 Privilege are marked with an "N" in the privilege column of the spreadsheets attached
23 to this Order. Defendants are ORDERED to produce these documents to Plaintiffs no
24 later than **December 9, 2020**;

- (2) Documents where Defendants’ Deliberative Process Privilege assertion is sustained are marked with a “Y” in the privilege column of the spreadsheets attached to this Order. Where the Court has not indicated a further review should occur under FTC v. Warner Commc’ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), the Parties should assume that the Court finds Defendants would prevail on a subsequent Warner analysis of these documents and Defendants need not take any further action; and
- (3) Documents that require further input from the Parties as to how they may be impacted by an analysis under Warner, as discussed below. As to these documents, the Government will prepare a submission outlining its position as to why the Warner factors favor the Government not later than **December 9, 2020**. The Plaintiffs will have until **December 16, 2020** to respond. The Court will then issue a subsequent Warner determination.

Background

On July 15, 2020 the Court ordered Defendants to apply a temporal filter to documents withheld solely on the basis of the Deliberative Process Privilege (“DPP”) of July 13, 2015 through June 30, 2016 and September 14, 2017 through January 11, 2018. (Dkt. No. 545.) The timeframes encompass the period during which the Obama administration was considering what would become the Carter Policy, which allowed open military service by transgender individuals, and the period of time during which the Trump administration was considering its policy of barring military service by transgender individuals, respectively. (Dkt. Nos. 536, 540-42). The Court concluded that going forward, documents outside these timeframe are presumptively not privileged under the DPP because they were not predecisional, as required under the test set forth in National Wildlife Federation v. U.S. Forest Service, 861 F. 2d 1114,

1 1117 (9th Cir. 1988) (to qualify for the privilege, “a document ‘must be *both* (1) ‘predecisional’
 2 or ‘antecedent to the adoption of agency policy’ and (2) ‘deliberative,’ meaning ‘it must actually
 3 be related to the process by which policies are formulated’”)(citation omitted, emphasis in
 4 original).

5 The Court has now reviewed and analyzed five sets of documents from the presumptively
 6 non-predecisional timeframes that the Government has submitted for *in camera* review; the most
 7 recent four are addressed below. The remaining documents from the presumptively
 8 non-predecisional timeframes, which were previously withheld exclusively pursuant to the DPP
 9 and which were not submitted to the Court, have now been produced to Plaintiffs. (Dkt. Nos.
 10 597 at 2; 637 at 2.)

11 This Order and its attachments concern the Government’s four latest *in camera*
 12 submissions, which are discussed in a series of declarations from Robert E. Easton, the Director,
 13 Office of Litigation Counsel, in the DoD. Mr. Easton describes the Government’s submissions
 14 as consisting of the following categories of documents:

15 (1) The first set (Dkt. No. 599), submitted on September 4, 2020, concerns DoD “policy
 16 deliberations that occurred from January 11, 2018 to February 22, 2018.” (Dkt. No.
 17 598, Ex. 1, ¶ 6.) Of this group, the Court was unable to review 55 documents – the
 18 first 53 and the last two listed on the Government’s privilege log. These documents
 19 were not in the group of physical copies submitted to the Court.

20 (2) The second set (Dkt. No. 624), submitted on October 9, 2020 are communications
 21 during the period July 26, 2017 through September 14, 2017. These documents
 22 include “emails discussing the process for formulating the interim guidance on
 23 transgender military service” following the President’s Tweet reversing the Carter
 24

1 Policy (Dkt. No. 623, Ex. 1, Declaration of Robert E. Easton, ¶ 7); “edits from
2 personnel within OSD, the Army, Navy, Air Force, Coast Guard, and Joint Staff on
3 the draft interim guidance” issued by Secretary Mattis following the President’s
4 Tweet (id., ¶ 8); an email chain regarding additional information Secretary Mattis’s
5 Chief of Staff “wanted to add to the drafts before they were sent to Secretary Mattis
6 for review” (id., ¶ 9); “talking points, holding statements, and responses to questions
7 from the media” (id., ¶ 10); 50 copies of a draft statement from Secretary Mattis on
8 the issuance of the interim guidance (id., ¶ 11); drafts of a letter to the President from
9 Secretary Mattis (id., ¶ 12); and documents the Government describes as reflecting
10 “deliberations by OSD staff concerning subjects unrelated to transgender service” (id.
11 ¶ 13).

12 (3) The third set (Dkt. No. 633), submitted on October 30, 2020 includes drafts of a
13 memorandum on military service by transgender individuals written by the Deputy
14 Secretary of Defense for Secretary Mattis (Dkt. No. 632, Ex. 1, Declaration of Robert
15 E. Easton, ¶¶ 7-8); drafts of a memorandum written by senior DoD officials for
16 Secretary Mattis describing the policy development process in the days before
17 Secretary Mattis decided to delay accessions of transgender applicants on June 30,
18 2017 (id., ¶¶ 9-10); emails reflecting Secretary Mattis's views on the Military
19 Services' positions regarding delay of military accessions by transgender individuals
20 (id., ¶ 11); emails, PowerPoint slides, and memoranda from the Military Services to
21 the Secretary Mattis concerning whether to delay the accessions policy (id., ¶ 12); and
22 emails between the Deputy Secretary of Defense and other senior DoD officials on
23 accessions (id., ¶ 13).

1 (4) The fourth set (Dkt. No. 639), submitted on November 13, 2020 consists of draft
2 plans prepared in anticipation of a decision from the President in response to the
3 Report and Recommendation (Dkt. No. 638, Ex. A, Declaration of Robert E. Easton,
4 ¶ 7); and talking points prepared on February 23, 2018, in anticipation of the
5 President’s decision (id., ¶ 8).

6 The Court’s has reviewed *in camera* the Government’s four most recent submissions, and
7 has made determinations as to each individual document, as indicated in the four attachments to
8 this Order. The Court’s review was solely focused on whether the documents qualify as
9 protected by the DPP. If a document does not qualify, because it is either not predecisional or
10 deliberative, it is not entitled to DPP protection. On the other hand, if the documents meet the
11 deliberative test required for DPP protection, the inquiry continues. In Warner, 742 F.2d at
12 1161, the court held that an otherwise protected DPP document could be ordered produced after
13 considering four factors: (1) the relevance of the evidence; (2) the availability of other evidence;
14 (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder
15 frank and independent discussion regarding contemplated policies and decisions. The Ninth
16 Circuit previously found that the second and third Warner factors—the availability of other
17 evidence and the government’s role in the litigation—favor Plaintiffs here. Karnoski v. Trump,
18 926 F.3d 1180, 1206 (9th Cir. 2019). However, the Circuit cautioned that the fourth factor in
19 particular “deserves careful consideration, because the military’s interest in full and frank
20 *communication* about policymaking raises serious—although not insurmountable—national
21 defense interests.” Id.

22 There are some documents that the Court has reviewed which appear material and require
23 a Warner review, as indicated on the attached spreadsheets. However, the Court has reviewed
24

1 the Defendants' submissions and finds them insufficient to support a determination about the
2 fourth Warner factor. To aid the Court, Defendants are ORDERED to file a submission
3 indicating why and how the transmittal of the specific identified documents would injure the
4 Government, either now or in the future. Many of the documents identified are copies. If the
5 identified documents are the same, then only one explanation need be made. The submission
6 should indicate the document numbers of all documents referenced. If they are not the same,
7 then a separate submission should be made. The Court is particularly interested in hearing the
8 Government's concerns about injury likely to occur if the specifically identified documents are
9 ordered produced. This submission will be due on **December 9, 2020**. Plaintiffs may file a
10 response by **December 16, 2020**.

11 Where the Court has determined that the DPP applies, without requiring a separate
12 Warner analysis, the Parties should presume that the Court has determined that the balancing
13 test will favor the Defendants on that particular document. It may be difficult for Plaintiffs to
14 fully respond to the Government's submission because they do not have access to the documents.
15 Nevertheless, if Plaintiffs wish to file anything, it will be due one week after the Government's
16 submission. No reply submission will be filed, and the Court will then issue a Warner
17 determination order on those designated documents.

18 Conclusion

19 Defendants are therefore ORDERED to produce all documents where the privilege
20 category is designated with "N" in the spreadsheets attached to this Order by **December 9, 2020**.
21 The missing 55 documents will be filed with the Court on the same date. Defendants are not
22 required to produce documents marked with a "Y" at this time. For those documents requiring a
23 further Warner review, as indicated in the spreadsheets attached to this Order, the Defendants
24

1 will file their submission focusing principally on the fourth factor of the Warner analysis by
2 **December 9, 2020**. Plaintiffs, if they choose, can file a response not later than **December 16,**
3 **2020**, although one is not required. The Warner analysis will then be considered submitted, and
4 the Court will issue a further Order.

5 The clerk is ordered to provide copies of this order to all counsel.

6 Dated November 25, 2020.

7
8 

9 Marsha J. Pechman
10 United States Senior District Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24